# INDEX



## CITATIONS





762320—47

# In the Supreme Court of the United States

OCTOBER TERM, 1947

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No. 333

ERIC VON PATZOLL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 334

DEE GARLAND BRANDON, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 335

GENE LUTHER FEEZELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 336

JAMES H. EVANS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 47–56) are not yet reported.

## JURISDICTION

The judgments of the circuit court of appeals were entered July 9, 1947 (R. 56–58), and a petition for rehearing (R. 59–74) was denied August 14, 1947 (R. 75). The petition for writs of certiorari was filed September 9, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether the search and seizure were based on probable cause.

2. Pending petitioners' appeals from convictions of assisting in the transportation of intoxicating liquor into Oklahoma without the required Oklahoma permit, in violation of the Federal Liquor Enforcement Act of 1936, Oklahoma repealed her laws prohibiting the importation of liquor without a permit, which laws had made the Federal Act applicable to transportations into Oklahoma. The second question presented is whether Oklahoma's repeal of her prohibitory laws necessitated a setting aside of the convictions.

3. Whether the evidence was sufficient to sustain petitioners' convictions of "assisting" in the transportation of the liquor.

STATUTES INVOLVED

Section 3 (a) of the Federal Liquor Enforcement Act of 1936, c. 815, 49 Stat. 1928 (27 U. S. C. 223 (a)), provides:

> SEC. 3. (a) Whoever shall import, bring, or transport any intoxicating liquor into any State in which all sales (except for scientific, sacramental, medicinal, or mechanical purposes) of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall: (1) If such liquor is not accompanied by such permit or permits, license or licenses therefor as are now or hereafter required by the laws of such State; or (2) if all importation, bringing, or transportation of intoxicating liquor into such State is prohibited by the laws thereof; be guilty of a misdemeanor and shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 1 of Title 37 of the Oklahoma Statutes (1941 ed.) provides in pertinent part:

> It shall be unlawful for any person * * * to * * * sell * * * any

> liquors * * * which contain more than three and two-tenths (3.2%) per cent of alcohol, measured by weight, and which is capable of being used as a beverage * * *. A violation of any provisions of this section shall be a misdemeanor, and shall be punished by a fine * * * and by imprisonment * * *.

Sections 41 and 46 of Title 37 of the Oklahoma Statutes (1941 ed.) provided in pertinent part on June 9, 1946, the date of the offense involved herein:

> § 41. *Importation without permit unlawful.*—It shall be unlawful for any person * * * to import, bring, transport, or cause to be brought or transported into the State of Oklahoma, any intoxicating liquor * * * containing more than four (4%) percent of alcohol by volume, without a permit first received therefor as hereinafter provided
>
> * * * * *
>
> § 46. *Penalty for violation of Act.*—Any person violating any of the provisions of this Act shall be punished by a fine * * * and by imprisonment * * *.

Section 22 of the Oklahoma Act of April 24, 1947, effective on that date, provides in pertinent part:[1]

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[1] See R. 55, 66; see also Oklahoma Statutes Annotated (July 1947 Supplement), Title 37, § 163.1, note.

* * * 37 O. S., 1941, §§ 41, 42, 43, 44, 45, 46, 47, and 48 are hereby repealed.

**STATEMENT**

Count 1 of a two-count information (R. 5–7) filed June 10, 1946, in the District Court for the Western District of Oklahoma charged that petitioners, on June 9, 1946, transported from Texas into Oklahoma approximately twenty-nine cases of intoxicating liquor unaccompanied by the permit required under the laws of Oklahoma, in which State all sales of intoxicating liquor containing more than 4 per centum of alcohol by volume, except for scientific, sacramental, medicinal, or mechanical purposes, are prohibited, in violation of Section 3 (a) of the Federal Liquor Enforcement Act of 1936 (*supra,* p. 3). Count 2 charged that petitioners "did * * * assist in the transportation of" the same liquor, in violation of the same section. Following a trial by a judge, a jury having been waived (R. 16), petitioners were found not guilty on count 1 and guilty on count 2 (R. 44), and each was sentenced to imprisonment for 12 months and to pay a fine of $1,000 (R. 8–12). On appeal, the judgments of conviction were affirmed (R. 56–58), one judge dissenting on the ground that the proof did not support the convictions on the second count (R. 56).

The evidence adduced by the Government may be summarized as follows:

Twice within an hour on the evening of June 8, 1946, two agents of the Alcohol Tax Unit observed petitioners Von Patzoll, Brandon, and Feezell in Von Patzoll's Buick coupe outside a liquor store in Dallas, Texas. On the first occasion, Von Patzoll, and on the other occasion one of his companions, entered the store. Von Patzoll had been known to the agents for several years as a liquor dealer in Oklahoma City. (R. 18–19, 26, 32.) Several hours later the Buick coupe returned to the vicinity, and Brandon was seen to leave the car and join another man in an International truck that was parked in a parking lot. This other man had been previously observed around the truck, and was later identified as petitioner Evans. (R. 19, 33, 35.) Driven by Evans, the truck was then observed to proceed to a point close to a nearby filling station, not then open, where it parked with its lights extinguished (R. 19). Two other agents, who had in the meantime been summoned to the scene by radio, observed packages resembling cases of whiskey being loaded into the truck at this location from a Buick sedan owned by Feezell, which had shortly before pulled up beside the truck (R. 20, 28, 35). Presently, the truck, followed by the Buick sedan, was observed to proceed north, and all four agents followed in two cars (R. 20, 28–29). The Buick sedan turned off in another direction after a short while, and the agents continued to follow the truck. The

agents "never let it out of our sight until it got to Moore, Oklahoma." Agent Mogridge testified that the truck first stopped at Davis, Oklahoma, where "it [*sic*] * * * got some coffee." (R. 20.) Agent Pauly testified that at Davis he and agent Lamphear "were immediately behind Mr. Evans' truck and he pulled up to the filling station on one side of the street, and we pulled up at another. That is the first time I had seen Mr. Evans, and he was by himself in the truck at that time" (R. 35). Evans then drove the truck to Moore, Oklahoma, where he parked at approximately 4 a. m. A half hour later, Von Patzoll, Brandon, and Feezell arrived on the scene in two vehicles, one of which was the Buick coupe in which they had been seen the previous evening. (R. 20–21, 23.) The four petitioners had a short conference, following which the truck, occupied by Evans and Feezell, and the Buick coupe, driven by Von Patzoll, proceeded again along the highway, while Brandon, in the third vehicle, after accompanying the other vehicles a short distance, turned off the road and drove to his home in the vicinity (R. 21–22, 30).

Within a short while the agents stopped the Buick coupe and, a half mile beyond, the truck. After the agents identified themselves, Evans was asked whether he had a manifest or bill of lading for what he had on the truck. When he replied in the negative, he was asked what he had on the

truck, to which he answered that he had "what you are looking for." Informed that "We are looking for liquor," Evans replied, "Well, I have got it." The agents then looked into the truck and found approximately thirty cases of whiskey under a tarpaulin. Evans and Feezell were then arrested. On being asked whether he had any whiskey in the Buick coupe, Von Patzoll, who had been arrested a short time before the conversation with Evans and the finding of the whiskey in the truck, voluntarily delivered a fifth-gallon to the agents. (R. 21–22.) Brandon was apprehended a short while later as he was driving toward the scene of his companions' arrest. No liquor was found in the vehicle in which he had arrived at Moore. (R. 30.)

**ARGUMENT**

1. Petitioners' contention that the seizure of the whiskey in the truck was in violation of the Fourth Amendment because it was effected without a warrant and not based on probable cause (Pet. 2, 8, 11–22) is clearly without merit. The agents' observations preceding their stopping of the truck, together with Evans' admission to the agents, prior to his arrest, that he had liquor on the truck, obviously constituted sufficient basis for the search. *Husty* v. *United States*, 282 U. S. 694, 700–701; *Carroll* v. *United States*, 267 U. S. 132, 147–162; *Morgan* v. *United States*, 159 F. 2d 85, 86–87 (C. C. A. 10).

2. Effective April 24, 1947, while petitioners' appeals were pending in the circuit court of appeals (see R. 15, 56–58), §§ 41–48 of Title 37 of the Oklahoma Statutes were repealed (*supra*, pp. 4–5). The repealed sections had made it unlawful to import intoxicating liquor containing more than 4 percent of alcohol by volume into Oklahoma without a permit (*supra*, p. 4). Thus, in conjunction with Title 37, § 1 (*supra*, pp. 3–4), whereby sales of intoxicating liquor in Oklahoma were and still are prohibited, the repealed sections had made Section 3 (a) of the Federal Liquor Enforcement Act (*supra*, p. 3), on which the information in this case was based, applicable to transportations of intoxicating liquor into Oklahoma. Compare *Dunn* v. *United States*, 98 F. 2d 119, 120–121 (C. C. A. 10), with *Tucker* v. *United States*, 123 F. 2d 280 (C. C. A. 10). Consequently, the federal act has not applied to transportations of liquor into Oklahoma since April 24, 1947. See *Dunn* v. *United States, supra*. Petitioners contend that notwithstanding that the offense charged in the information, as well as their convictions, occurred prior to April 24, 1947, the termination of the applicability of the federal act to transportations of liquor into Oklahoma on that date necessitated a setting aside of their convictions by the court below (Pet. 2, 8–9, 23–29). The contention is without merit.

Even if the federal act itself had been repealed subsequent to petitioners' violation of it, the re-

peal would not, of course, have barred their prosecution, much less affected the validity of their convictions, in the absence of an express provision in the repealing act extinguishing previously incurred liability. See 1 U. S. C. 29. But the federal act is still in full force and effect. It is true, as the court below observed (R. 55), that "the existence of the requisite prohibitory laws of Oklahoma is a factual ingredient of the Federal offense with respect to importations into Oklahoma." But that factual ingredient, while it has not existed since April 24, 1947, did exist when petitioners' offense was committed. Consequently, Oklahoma's repeal in April 1947 of her laws prohibiting the importation of intoxicating liquor without a permit, as the court below further observed (*ibid.*), "merely brought to an end a continuing fact which is an essential factual element of the Federal offense. Since the facts essential to the Federal offense were present at the time that offense was committed, the subsequent repeal of the Oklahoma statute does not bar the Federal prosecution."

*United States* v. *Chambers,* 291 U. S. 217, relied on by petitioners (Pet. 26–29), held that the repeal of the Eighteenth Amendment deprived the National Prohibition Act of all vitality, so that prosecutions under that Act commenced before repeal, including those in the appellate stage, automatically expired. But that decision

is clearly distinguishable from the present case, since the repeal of a state law forming merely a factual element of an offense under a federal statute is in no substantial sense analogous to the repeal of the federal constitutional provision from which a federal statute derives its entire authority and validity.

3. Petitioners, as we have stated, were acquitted on count 1, charging transportation of the liquor in question, and convicted on count 2, charging them with assisting in the transportation. They contend that the evidence does not sustain their conviction on the assisting count (Pet. 29–34).

The theory of the circuit court of appeals was that the proof did not show who transported the liquor from Dallas, Texas, to Davis, Oklahoma, in its trip across the state line,[2] but that the movement was a continuous journey from Dallas to the point of seizure near Moore, Oklahoma; that petitioners Evans and Feezell assisted in the

[2] The proof, however, indicates that Evans transported the liquor from Dallas to Davis. It shows that the agents never let the truck out of their sight from the time it left Dallas until its arrival in Moore, Oklahoma, and that Evans was alone in the truck when it reached Moore. Agent Mogridge testified that the truck stopped en route at Davis, Oklahoma, where the driver "got some coffee," but he did not expressly identify the driver as of that time. Agent Pauly, however, did expressly identify the driver as of that time as Evans and testified that he was "by himself in the truck." (*Supra*, pp. 6–7.)

movement of the liquor in Oklahoma from Davis to the place of seizure; and that under the evidence the district court was warranted in finding that petitioners Von Patzoll and Brandon were interested in the transportation and induced or procured Feezell and Evans to assist therein, and thus was justified in adjudging them guilty as principals (R. 53–54). The court distinguished its prior decision in *Morgan* v. *United States*, 159 F. 2d 85, on the ground that "There was a total absence of proof that the transportation by Morgan was a part of the transportation from Fort Worth into Oklahoma. For aught that appears, the transportation into Oklahoma may have been completed and the whiskey come to rest in Oklahoma before it was transported in Oklahoma by Morgan." The dissenting judge was of the opinion that the instant case was indistinguishable from the *Morgan* case because the evidence showed that petitioners, acting together and in concert as principals, transported the liquor, so that there was no basis for concluding that some other person actually transported the liquor and that petitioners merely assisted him in so doing (R. 56).

We have no quarrel with the dissenting judge's view that the evidence would have supported petitioners' convictions on the transporting count, but only with his assumption that one cannot, under any circumstances, be guilty of assisting

in the transportation of liquor across a state line if he did the transporting or was legally responsible for it. This, we submit, is too legalistic an approach in a case such as this where the evidence shows activity by each petitioner which did, in fact, assist or further a forbidden transportation for which each could also have properly been held responsible. In the instant case, the movement of the liquor was not a continuous, unbroken one from the liquor store in Dallas where it was purchased to the point of seizure near Moore, Oklahoma. The truck on which it was loaded did not pick it up at the liquor store but at a filling station some distance away. The liquor had to be moved from the store to the place where the truck was loaded. While Evans was apparently the one who physically drove the truck from the filling station in Dallas to the place where the liquor was seized in Oklahoma, the proof shows that all of the petitioners, including Evans, were parties to the preliminary maneuverings whereby the liquor was moved from the liquor store to the point where it was loaded on the truck. And the assistance of Evans' associates in the transporting of the liquor did not terminate after the liquor left the Dallas filling station. Their intimate contact, at 4 o'clock in the morning, with the final phase of the interstate journey of the liquor-laden truck is consistent only with the view that they were assisting in the transportation of the liquor. There can be no

doubt that while all of the petitioners were in one way or another interested in the transportation of the liquor across the state line and hence were responsible for such transportation and could, appropriately, have been convicted under the transportation count itself, the evidence did show acts on the part of each petitioner which properly may be considered as "assisting" in the transportation of the liquor from the place of purchase to the place of seizure. Petitioners clearly have no cause for complaint because they were convicted only of assisting in the transportation rather than for the transportation itself. The evidence justified the convictions, and there is presented no problem of sentences for both transportation and assisting therein.

**CONCLUSION**

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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